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No. 08-1596

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE,

Petitioner,

v.

CARL DEATON, ET UX.,

Respondents.

On Petition For A Writ of Certiorari To The Court of Appeals of Texas Second District

PETITIONER'S REPLY TO OPPOSITION

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REPLY BRIEF FOR PETITIONER

Ms. Rhine urges due process and equal protection violations in seeking review of this case. The Deatons fail to address Ms. Rhine's equal protection claim. But they point out the damage inflicted by the Texas statutory scheme on all the parties in this case, including J.C., thereby underscoring the need for this Court to grant review and direct Texas to bring its statutory scheme into compliance with the Equal Protection Clause.

The Deatons mount three principal arguments against Ms. Rhine's due process claim. First, they urge this Court to deny review of Ms. Rhine's claim because she failed to raise it in the lower courts. Second, they contend sufficient safeguards ensured the reliability of the termination order. Lastly, they claim that Ms. Rhine cannot show harm resulting from her lack of counsel, basically arguing Ms. Rhine is such a terrible parent that the presence of counsel would not have affected the outcome. But these arguments do not overcome the important reasons for granting review in this case.

A. Applying Traditional Error-Preservation Standards To This Case Violates Due Process.

The Deatons' argument concerning error-preservation begs the question. Ms. Rhine concedes that application of error-preservation rules does not normally violate due process, even in termination proceedings involving *pro se* parties. But to deny appellate review based on error-preservation standards to a *pro se* litigant who defended a termination action without counsel, did not receive the benefit of the *Lassiter* analysis, and was refused

a trial transcript at State expense violates due process. And applying error-preservation standards to deny review of the propriety of applying error-preservation standards creates a circular rule insulating error-preservation decisions from constitutional scrutiny. Though it erred in applying the rule to this case, the Texas Supreme Court has recognized that error-preservation rules must sometimes be relaxed to afford due process. *See In re M.S.*, 115 S.W.3d 534, 549 (Tex. 2003).

The Deatons suggest that Ms. Rhine intentionally avoided obtaining the trial transcript as part of a scheme to bolster her constitutional claims. This suggestion is unsupported—and belied—by the record. Ms. Rhine requested leave to proceed on appeal as an indigent, specifically testifying that she could not afford to pay for the reporter's record (CR 52). It was the Deatons who contested that indigency claim. And even if Ms. Rhine—an uneducated hourly-wage fast food worker—were capable of hatching a sophisticated legal strategy to request but somehow avoid obtaining the trial transcript in the hopes of birthing a due process violation, she could not predict that the trial court would find her indigent yet still require that she pay for the reporter's record. And if she had engineered the denial, why then would she fail to raise the issue in her *pro se* appeal and petition for review? In short, the idea that Ms. Rhine somehow engineered denial of the transcript makes no sense when viewed in light of the facts.

Neither did Ms. Rhine simply refuse to pay for the record. The Deatons' claims that Ms. Rhine had the money to pay for the record are incorrect. In June of 2008, Ms. Rhine stated in her petition for

review to the Texas Supreme Court that she eventually raised funds to pay for the reporter's record, but not until after the record was sealed in March of 2007 (Petition for Review at 10). But Ms. Rhine did not state when she actually had the funds; it could have been any time between March of 2007 and June of 2008. And contrary to the Deatons' intimation, Ms. Rhine is not paying any costs in this Court—her lawyers are working for free and paying the expenses in an effort to vindicate Ms. Rhine's constitutional rights and guarantee due process and equal protection to other indigent Texans.

On a different record, the trial court's order requiring Ms. Rhine to pay for the transcript might be defensible as a factual finding that she was only partially indigent for purposes of appeal. But in this case, the trial court explained its reason for ordering Ms. Rhine to pay for the transcript, stating on the record that the decision was based on a desire for the court's reporter to be paid, not "to be out four hundred and five dollars for this appeal." (Transcript at 13).

Finally, nothing in the record indicates the Fort Worth Court of Appeals intended by its footnote citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) to instruct or encourage Ms. Rhine to file a motion for rehearing. If that was the case, it was a curious, disturbing, and ineffective route to take with a clear due process violation involving a *pro se* litigant. The court could simply have addressed the issue on the merits given its constitutional import. If the court was reluctant to do that, it could have made its instruction to Ms. Rhine explicit, stating in the footnote, for example, that the appellate rules permitted Ms. Rhine to file a motion for rehearing

raising the transcript issue. If the court intended for Ms. Rhine to seek rehearing, there was no need to veil that instruction.

Whatever the court's intention, the Deatons' theory that Ms. Rhine intentionally ignored an instruction to file a motion for rehearing is unsupported by the record. The Deatons contend that Ms. Rhine's ability to file a motion for new trial, appellate brief, and petition for review demonstrates her legal acumen. But as noted in the original petition, much of Ms. Rhine's writing borders on being incomprehensible. For example, Ms. Rhine did file what she called a "motion for re-trial" (CR 60) in which she argued:

> I am requesting A re-trial on the grounds I was never granted a hearing on my petitions requesting counsel be Appointed me, this being a termination of parental rights hearing; I was not allowed a hearing for my petition that counsel be appointed me, not being allowed to state my plea.

This motion, which did not cite any legal authority, hardly bolsters the Deatons' claim of Ms. Rhine's legal sophistication.

B. Even The Deatons Cannot Cite Sufficient Indicia Of Reliability.

The Deatons' claims concerning indicia of reliability are curious given the absence of any record of the trial. The Deatons' arguments concerning reliability all either presuppose the propriety of the Department's intervention and the trial court's decree, or assume the trial evidence

tracked accusations made by the Deatons in pre-trial instruments.

In the absence of a trial record there is no way for this Court to evaluate any safeguards supporting the trial court's termination order. We do not know whether the trial court permitted Ms. Rhine to confront the witnesses and evidence against her. We do not know whether the trial court applied the clear-and-convincing-evidence standard. We do not know whether the attorney ad litem for J.C. meaningfully participated in the trial or performed any pre-trial investigation. In short, there is no record of the safeguards normally present in a termination action. Yet we do know that Ms. Rhine did not have a lawyer, did not receive a transcript, and did not review substantive appellate review.

None of the indicia of reliability cited by the Deatons actually support the reliability of the trial court's decision. They instead presuppose the propriety of the Department's intervention and the trial court's decree, essentially arguing that the trial court's decree was reliable because it was correct. Certainly none of the purported indicia of reliability replaces the crucial bulwark against erroneous deprivations formed by appellate review.

The Deatons contend that two important indicators of reliability are the Department's removal of J.C. from Ms. Rhine's custody, and the Department's decision not to dismiss the case against Ms. Rhine but instead to ask the Deatons to file a case in Fort Worth. Again, these presuppose that the Department was correct in its assessment. This cannot be assumed in a child welfare system that remains "underfinanced and understaffed in the best of times, dysfunctional in the worst." Kirk

Johnson & Dan Frosch, *Sect Children Face Another World, But Still No TV*, N.Y. TIMES, Apr. 26, 2008, *available at* nytimes.com/2008/04/26/us/26raid.html.

Similarly, there is no record that the "trial court heard evidence" at trial. And as Ms. Rhine noted in her original petition to this Court, Texas trial courts make mistakes in termination orders even after hearing evidence and applying the clear-and-convincing-evidence standard (Petition for *Certiorari* at 16-17). Finally, the appointment of an attorney ad litem also fails to bolster reliability of the termination order because there is no record that attorney performed pre-trial investigation, participated meaningfully at trial, or had any basis upon which to make a recommendation concerning J.C.'s best interest. Ms. Rhine is not impugning the ad litem; she simply points out the impossibility of evaluating the various safeguards in the absence of a trial record.

Finally, the Deatons correctly note that the Texas Family Code forbids assessment against the State of fees for court-appointed counsel in privately-initiated termination proceedings. TEX. FAM. CODE ANN. § 107.015(c) (Vernon 2002 and Supp. 2008). The trial court clearly felt constrained by that statute, specifically telling Ms. Rhine that even if she were appointed counsel, Tarrant County would refuse to pay the resulting fees (Transcript at 5-6). The Family Code requires that attorney ad litem fees must be assessed either to the parents or, if the parents are indigent, to any other party that can afford to pay. TEX. FAM. CODE ANN. § 107.015(a), (b) (Vernon 2002 and Supp. 2008). This statute essentially sets Texas termination proceedings at odds with this Court's decision in *Lassiter*.

In *Lassiter*, this Court held that due process necessitates the appointment of counsel in at least some termination proceedings, and it instructed trial courts to make a case-by-case determination of the need for appointment of counsel. *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). But the Texas statute leaves trial courts in the untenable position of being unable to appoint counsel—even where due process demands it—in a case where none of the parties can afford to pay the resulting legal fees. The statute does not indicate what a Texas court should do where it performs the *Lassiter* analysis and concludes that due process requires court-appointed counsel, but finds that no party to the case can afford to pay for that court-appointed counsel. And this is another reason for granting review.

C. Ms. Rhine Cannot Prove Harm Because She Lacks The Trial Transcript.

Ms. Rhine cannot possibly demonstrate what effect counsel might have had at trial because she lacks the transcript. For that same reason, the Deatons cannot possibly demonstrate that the outcome would have been the same had counsel been appointed for Ms. Rhine. The Deatons' factual claims concerning Ms. Rhine assume that the trial testimony tracked pre-trial affidavits and instruments, which may or may not be true but is impossible to establish given the lack of a transcript.

The Deatons nevertheless attack Ms. Rhine as an unfit mother and a danger to J.C. based principally on allegations in an affidavit from Ms. Deaton (CR 8-11; Response at 18-19). That affidavit makes clear that many of the accusations are based on hearsay or other second-hand knowledge. More important, there is no record that Ms. Rhine ever

was permitted to confront these accusations. In fact, Ms. Rhine claims she was unable to confront the accusations meaningfully at the temporary orders hearing or trial due to her lack of counsel. As Ms. Rhine later noted: "Every question I asked [at the temporary orders hearing] was objected to by the other attorneys . . . ." (CR 40).

Texas adjudged Ms. Rhine indigent but denied her a lawyer both at trial and on appeal, made that decision without engaging in the *Lassiter* analysis required by this Court, refused to permit Ms. Rhine a free trial transcript, and then refused appellate review both of the merits of termination and the colorable due process and equal protection claims. In the end, Ms. Rhine said it best in her letter to the trial court: "Right now at this moment in time I need only two things[: J.C.] and an attorney" (CR 40).

CONCLUSION

Based on the Due Process Clause and the Equal Protection Clause, and this Court's decisions in *Lassiter* and *M.L.B.*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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